

STATE OF MICHIGAN  
IN THE SUPREME COURT

JOHN KRUSAC, Personal Representative  
of the ESTATE OF DOROTHY KRUSAC,  
Plaintiff-Appellee,

Supreme Court No.

COA No. 321719

Saginaw Cir Ct No. 12-015433-NH/A

v

COVENANT MEDICAL CENTER INC.,  
d/b/a COVENANT MEDICAL CENTER –  
HARRISON, d/b/a COVENANT HEALTHCARE,  
Defendant-Appellant.

*F. Borckney*

Jointly and severally,

~~Defendant-Appellant.~~

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**DEFENDANT-APPELLANT COVENANT HEALTHCARE'S  
APPLICATION FOR LEAVE TO APPEAL**

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**FILED**

MAY 13 2014

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## ORDER APPEALED

Defendant-Appellant seeks leave to appeal the May 8, 2014 “Opinion and Order Re: Discovery” issued by the Saginaw Circuit Court, Honorable Fred L. Borchard presiding, requiring Defendant-Appellant Covenant Healthcare to immediately produce the first page of the Defendant-Appellant’s “Improvement Report” to Plaintiff. (See **Exhibit 1**). This Opinion and Order issued the week before trial requires Defendant-Appellant Covenant Healthcare to disclose information which is not subject to discovery by way of the peer review statutes. See MCL 333.20175(8) and MCL 333.21515.

On May 12, 2014 Defendant-Appellant filed an Application for Leave to Appeal with the Michigan Court of Appeals, as well as a Motion for Stay Pending Appellate Review and a Motion for Immediate Consideration of Defendant-Appellant’s Motion for Stay Pending Appellate Review. The Michigan Court of Appeals issued an Order granting Defendant-Appellant’s Motion for Immediate Consideration, but denying its Motion for Stay and Application for Leave to Appeal. (See Exhibit 2).

This Application for Leave to Appeal is being filed as a result of the January 30, 2014 *Harrison v Munson Healthcare, Inc.*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2014), opinion from the Court of Appeals. In short, the Court of Appeals’ decision is in opposition to the Legislature’s intent in promulgating a comprehensive ban on communications made pursuant to the peer review process. The Court of Appeals erred in failing to interpret the statutory language of MCL 333.20175(8) and MCL 333.21515 pursuant to plain and ordinary meaning of the words used by the Legislature. By creating an arbitrary “objectively reported contemporaneous observation” exclusion to otherwise peer review privileged “records, data, and

knowledge” gathered for a peer review committee, the Court of Appeals improperly usurped the role of the Legislature.

For all the reasons set forth in greater detail below, Defendant-Appellant Covenant Healthcare respectfully requests that this Court grant its Application for Leave to Appeal and correct the erroneous holding of the Court of Appeals in *Harrison*.

**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE TRIAL COURT ERR IN ITS INTERPRETATION OF MICHIGAN'S PEER REVIEW STATUTES, BASED IN PART, ON ITS RELIANCE ON THE COURT OF APPEALS' IMPROPER HOLDING IN *HARRISON V MUNSON HEALTHCARE, INC?***

The trial court answered: "NO"

Appellant Covenant Healthcare answers: "YES"

- II. DID THE TRIAL COURT ERR IN FINDING THAT THE "IMPROVEMENT REPORT" WAS NOT SUBJECT TO PEER REVIEW PRIVILEGE AND REQUIRING DISCLOSURE OF THE "IMPROVEMENT REPORT'S" CONTENTS TO PLAINTIFF?**

The trial court answered: "NO"

Appellant Covenant Healthcare answers: "YES"

## STATEMENT OF FACTS

In the medical malpractice action giving rise to this application for appeal, Plaintiff John Krusac contends that Defendant Covenant and its nursing staff failed to appropriately monitor or otherwise left decedent Dorothy Krusac “unattended” following a cardiac catheterization procedure on September 12, 2008. Plaintiff maintains that this allowed Ms. Krusac to “fall” off the procedure table following the procedure.

Plaintiff’s theory is that as a result of this fall, Ms. Krusac struck her head on the floor, sustaining a “closed head injury and traumatic brain injury that did not immediately manifest clinically or on CT imaging . . . and neurogenic pulmonary edema.” Plaintiff further maintains . . . this process caused increased fluid to accumulate in her lungs, thereby worsening her cardiac function and ultimately causing her death on October 8, 2008.

Over the course of discovery, Plaintiff deposed Defendant’s staff members who were present in the catheterization lab during, and immediately following, Ms. Krusac’s cardiac catheterization procedure. Those individuals were Rogers Gomez, Nurse Heather Gengler, and Nurse Deb Colvin. In short, each individual testified that as Ms. Krusac was rolling off the catheterization table, Nurse Colvin was able to hook her arms underneath Ms. Krusac and, with the assistance of Mr. Gomez, lower her to the floor.

During her deposition, Nurse Colvin testified as follows:

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- Q. Okay. Got it. So you see – you see her rolling off the table at this point?
- A. Correct.
- Q. Is she rolling off the table the side away from you or the side towards you?
- A. Towards me.
- Q. What do you do?

A. I run over and hook my hands underneath her.

Q. And what happens?

A. I bring her down, because she's going down to the ground and my arms are underneath her.

Q. Both arms? One arm?

A. Both arms.

Q. Is anyone observing this happening?

A. I don't know. I didn't see if anybody – I mean, I'm just concerned with her, and my face is buried in her chest.

[See Exhibit 3, Colvin Dep Tr at 37.]

\* \* \*

Q. And so does Miss Krusac – does her body make contact with the floor?

A. Parts of it, I guess. My arms are completely underneath, so I'm not – I don't know exactly what hit the ground.

[See Exhibit 3, Colvin Dep Tr at 38.]

\* \* \*

Q. So you take the position that you slowed down her fall or had – or just that you had your arms under her at the time that she fell in terms of arms being under the torso?

A. I feel that I definitely softened her fall.

[See Exhibit 3, Colvin Dep Tr at 41.]

\* \* \*

Q. And she did not lose [sic] consciousness, as far as you could tell?

A. No, she did not.

Q. You had a discussion with her?

A. Yes. I asked her if she was having any pain anywhere. I asked her if she had hit her head.

Q. She denied that?

A. Correct.

Q. And this was like a discussion that happened moments like within seconds of the fall?

A. Correct.

[See Exhibit 3, Colvin Dep Tr at 43.]

Meanwhile, Mr. Gomez's testimony largely confirmed Nurse Colvin's description of events. He testified as follows:

Q. So describe for me how that occurred and how she got to the ground.

A. We laid her down. She was falling, and we gently laid her down.

Q. So when you got to – how long did it take you to get to Miss Colvin and Miss Krusac?

A. As I said before, about two seconds, two or three seconds.

Q. All right. And had there been a little bit more movement or little bit more – Miss Krusac and Miss Colvin descend a little bit more towards the floor at that point from where you initially observed them?

A. She was sort of at the edge of the table, and Debbie was cradling her, and she was going down with her, holding her, and I went to assist.

[See Exhibit 4, Gomez Dep Tr at 21-22.]

\* \* \*

Q. So where did you position yourself and where did you put your hands on Miss Krusac to assist in lowering her to the floor?

A. Cradling her head, neck and shoulders.

[See Exhibit 4, Gomez Dep Tr at 22.]

\* \* \*

Q. And do you know approximately where Miss Colvin's hands or arms were on the patient?

A. Probably I would think she was next to me. I was trying to make sure she didn't hit her head on the floor, but laid her on the floor. But Debbie, I would say around her thoracic, lower lumbar spine, around that area, and her other - left arm was towards her pelvis and thigh.

Q. Did any part of Miss Krusac's body make contact with the floor, that was not otherwise supported by either you or Miss Colvin?

A. That I would say - it had to make contact, but it was well guarded, because she was cradled.

[See Exhibit 4, Gomez Dep Tr at 23.]

Finally, Nurse Gengler testified that she first noticed Ms. Krusac rolling off the cath table as the action was occurring. (See Exhibit 5, Gengler Dep Tr at 16). She testified as follows:

Q. Okay. And so what was the first indication to you that you can remember that there was something amiss as it related to Miss Krusac?

A. I can remember Deb saying something, and turning around at the same time, and catching her at the same time I was jumping up to go out in the room.

[See Exhibit 5, Gengler Dep Tr at 16.]

\* \* \*

Q. And you saw at that point - did Miss Colvin - at that point that you first looked up, did Miss Colvin have her hands on Miss Krusac at this point?

A. I'm not sure.

Q. Okay. Was Miss Krusac still on the table, or off the table, or in the process of rolling off the table?

A. I believe she was in the process.

[See Exhibit 5, Gengler Dep Tr at 16.]

\* \* \*

Q. Okay. Did you observe anything else at that point?

A. No, I was in there before – almost before she – Deb had assisted her down and Rogers had assisted her to the ground.

Q. Okay. Was there a point that Miss Colvin actually had Miss Krusac cradled in her arms and Miss Krusac was neither on the ground, or on the table, or in contact with the table?

A. I guess I'm not sure of your question. Deb had her in her arms before she left the table, in the motion of her rolling off the table.

[See **Exhibit 5**, Gengler Dep Tr at 18.]

Significantly, Nurse Deb Colvin testified that she filled out an Incident Report after this event. The report was then given to her nursing supervisor and routed through the appropriate channels to Defendant's peer review committee. (See **Exhibit 3**, Colvin Dep Tr at 47-48). Mr. Gomez testified that he was questioned for purposes of providing information to a peer review committee, but not fill out an Incident Report. (See **Exhibit 4**, Gomez Dep Tr at 27). Nurse Gengler did not fill out an Incident Report, nor was she questioned. (See **Exhibit 5**, Gengler Dep Tr at 24).

Plaintiff had knowledge of the "Improvement Report's" existence as early as October 24, 2012. Despite this, Plaintiff waited until virtually the eve of trial to request the production of the "Improvement Report" by way of a motion *in limine*. (See **Exhibit 6**, Plaintiff's Motion in Limine Regarding Production of Facts Contained in Incident Report). Plaintiff's primary argument was simply that the Incident Report should be admissible to cross examine Defendant's staff members, and to ensure that a "fraud" was not being committed upon the trial court.<sup>1</sup>

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<sup>1</sup> In short, Plaintiff argued, in reliance upon *Harrison v Munson Healthcare, Inc.*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2014), that the trial court was obligated to ensure that a defense counsel was not presenting a defense

The trial court initially **denied** Plaintiff's Motion in Limine. (See **Exhibit 7**). Plaintiff thereafter filed a Motion for Reconsideration. (See **Exhibit 8**, Plaintiff's Motion for Reconsideration of March 21, 2014 Order Denying Plaintiff's Motion in Limine Regarding Production of Facts Contained in Incident Report). On May 2, 2014 the trial court entered an Order requiring that Defendant produce a copy of the "Improvement Report" for in-camera review. (See **Exhibit 9**). Hearing was also conducted on May 5, 2014. (See **Exhibit 10**). On May 8, 2014 the trial court entered an Order requiring Defendant to immediately turn over to Plaintiff the first page of its "Improvement Report."<sup>2</sup> (See **Exhibit 1**).

The "Improvement Report" was not made part of Ms. Krusac's medical record. Rather, it was created for purposes of Defendant's peer review process, in a concerted effort to reduce patient mortality and morbidity. Moreover, the testimony of Defendant's staff members is **entirely consistent** with the so-called "procedure log" from the September 12, 2008 cath procedure. Indeed, the procedure log indicates that at 17:49, Ms. Krusac "rolled off the table to the floor." (See **Exhibit 11**). Accordingly, any statements contained in the "Improvement Report" obtained after this event, are not only privileged, but also constitute inadmissible hearsay.

Unfortunately, the position taken by Plaintiff's counsel is exactly what plaintiffs are doing everywhere – they now seek to obtain statutorily protected information by claiming in every case that they have somehow been "lied to" or "misled." This argument, offered in a vacuum and

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inconsistent with facts contained within the "Improvement Report." Notably, Defense counsel had never even seen the "Improvement Report" until the trial court required that the document be provided for in-camera review. Furthermore, Plaintiff's argument was based on nothing more than pure speculation and nothing more than generalized concerns, with no specific application to the present matter.

<sup>2</sup> Notably, the May 8, 2014 Order was received by way of a facsimile from the trial court in the late afternoon/early evening of Thursday, May 8, 2014 – with trial set to begin on Tuesday, May 13, 2014.

absent any specific evidence, is now being offered in an attempt to effectively eviscerate the peer review privilege.

The clear and unambiguous language of the statutory provisions establishing the peer review privilege imposes a strict limitation upon the use of records, data, and knowledge collected (as they were in this case) by or for a peer review entity. Such records, data, and knowledge can be used only for the purposes provided in Article 17 of the Public Health Code, are not public records, and are not subject to court subpoena. See MCL 333.21515; MCL 333.20175(8).

Review and disclosure in relation to medical malpractice litigation is not among the purposes addressed or provided for in Article 17 of the Public Health Code. Therefore, having properly determined that the "Improvement Report" and related documents at issue were protected by the peer review privilege, Judge Borchard should have concluded that Covenant and its counsel had no duty to disclose the content of those documents in relation to this medical malpractice litigation.

Defendant respectfully maintains that in *Harrison v Munson Healthcare, Inc*, a panel of this Court abused its discretion and improperly interpreted the peer review statutes. In doing so, the Court improperly usurped the role of the Legislature. However, even if this Court is not convinced that it wrongly decided *Harrison*, this case is clearly distinguishable from *Harrison*.

Plaintiff sought production of the "Improvement Report" based on nothing more than a purported thought or hunch that it "may" or "might" contain a different version of events from those presented by Defendant. However, it is significant to note that following the in-camera review of the "Improvement Report" the trial court failed to indicate that there were any

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"inconsistencies" with Defendant's asserted defenses. Accordingly, the only interpretation is that the facts contained within the "Improvement Report" were congruent and otherwise consistent with the testimony of Mr. Gomez and Nurses Colvin and Gengler.

Plaintiff has already deposed each of Defendant's staff members that were present at the time of this incident. Each has testified that they have specific recollection of this event. While Plaintiff is entitled to use the medical records in an attempt to impeach the testimony of these individuals, it is improper to invade the peer review privilege for such a reason. As there are no inconsistencies, Plaintiff is unable to demonstrate an exceptional necessity that would warrant production of the "Improvement Report."

Accordingly, Defendant respectfully requests this Court to enter an order reversing the trial court's Order requiring that Defendant produce the first page of the "Improvement Report" as said report constitutes privileged peer review material and is not subject to discovery.

#### STANDARD OF REVIEW

To the extent that the trial court's decision was based upon interpretation of the pertinent statutory provisions regarding the peer review privilege, this Court's review is *de novo*. It is well settled that questions of statutory construction and other questions of law are reviewed *de novo*. *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004); *Bartlett v North Ottawa Community Hospital*, 244 Mich App 685; 625 NW2d 470 (2001).

## LEGAL ARGUMENT

### I. HARRISON V MUNSON HEALTHCARE, INC. WAS WRONGLY DECIDED BY THE COURT OF APPEALS.

#### A. DEFENDANT'S "IMPROVEMENT REPORT" IS PRIVILEGED AND NOT SUBJECT TO DISCOVERY OR PRODUCTION.

In ordering Defendant to produce the first page of its "Improvement Report" the trial court gave great weight to this Court's recent decision in *Harrison v Munson Healthcare, Inc.*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_ (2014). However, both the trial court and a prior panel of this Court ignored the clear Legislative intent behind the peer review statutes. Moreover, both the trial court and the Court in *Harrison* chose to ignore the rulings and precedential value of prior Michigan Supreme Court opinions that control this very issue. In short, requiring the production of peer review materials – including "objective facts gathered contemporaneously with an event" – is equivalent to opening Pandora's Box.

As a state licensed hospital, Defendant is subject to the mandate of MCL 333.21513, which requires hospitals to implement a peer review process for "the purpose of reducing morbidity and mortality and improving the care provided in the hospital for patients." MCL 333.21513 (a) and (d). To facilitate the effective performance of this important duty, our Legislature has enacted provisions creating a statutory peer review privilege – provisions that impose strict limitations upon the use of records, data and knowledge which have been collected, as they were in this case, for purposes of peer review.

The Legislature has provided that records, data, and knowledge collected for or by peer review entities are confidential and not discoverable. See MCL 333.21515, MCL 333.20175(8), and MCL 331.533. These nondisclosure protections apply regardless of the nature of the claim

asserted by the party seeking the records. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 715; 683 NW2d 699 (2004). Further, the Legislature has granted immunity to persons, organizations, and entities that provide information to peer review groups or perform protected peer review communicative functions. See MCL 331.531.

MCL 333.21515 states that:

*The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena. [Emphasis added.]*

Meanwhile MCL 333.20175(8) states:

*The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or an institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena. [Emphasis added.]*

By its enactment of these provisions, the Legislature clearly manifested its belief that confidentiality is essential to successful peer review, and must therefore be preserved. As a panel of the Court of Appeals explained in *Attorney General v Bruce*, 124 Mich App 796, 802-803; 335 NW2d 697 (1983):

It is readily apparent that the statutory privilege created with respect to peer review committee communications was intended to encourage those committees to conduct their proceedings in a frank and professional manner. By insuring that the proceedings remain confidential, the Legislature has provided strong incentive for hospitals to carry out their statutory duties in a meaningful fashion. In the absence of such protection, associates of those physicians being investigated by the hospital might prove to be much more reluctant to evaluate their colleagues' skills in an objective fashion.

The reported decisions discussing the aforementioned statutes have emphasized that their terms are clear and unambiguous, and provide broad and comprehensive protection against disclosure of

records, data and knowledge collected for facilitation of peer review. And as the appellate decisions of this state have often recognized, it is axiomatic that clear and unambiguous statutory language is not subject to interpretation and must be applied as written. This was noted by this Court in *Attorney General v Bruce*, 422 Mich 157; 369 NW2d 826 (1985), which held that peer review documents were not subject to disclosure pursuant to an investigative subpoena issued in furtherance of an investigation conducted under Article 15:

Internal peer review activities are required by article 17. MCL 333.21513; MSA 14.15(21513) expressly provides that the records, data, and knowledge collected by the peer review committee "shall be used only for the purposes provided in this article." This language is unambiguous. Where the statutory language is plain and unambiguous, judicial construction or interpretation which would distort the plain meaning is precluded. *Jones v Grand Ledge Public Schools*, 349 Mich 1, 9-10; 84 NW2d 327 (1957). *Bruce* at 165.

In *In re Investigation of Lieberman*, 250 Mich App 381; 646 NW2d 199 (2002), the Court of Appeals noted that the Legislature had chosen to protect peer review materials in "broad terms" by imposing "a comprehensive ban" on the disclosure of any information collected by peer review committees, and specially emphasized its "statutory admonishment" limiting the use of such information to purposes within the scope of Article 17:

The clear language of § 21515 provides: (1) peer review information is confidential, (2) peer review information is to be used "only for the purposes provided in this article," (3) peer review information is not to be a public record, and (4) peer review information is not subject to subpoena. Section 21515 demonstrates that the Legislature has imposed a comprehensive ban on the disclosure of any information collected by, or records of the proceedings of, committees assigned a professional review function in hospitals and health facilities.

\* \* \*

Underscoring the high level of confidentiality attendant to peer review documents is the statutory admonishment that such information is to be *used only for the reasons set forth in the legislative article including that privilege*. See article 17 of the Public Health Code, MCL 333.20101 to 333.22260. [Emphasis in Opinion.]

\* \* \*

The Attorney General asserts that compelling policy considerations militate in favor of holding the statutory privilege narrowly to its terms and allowing the material here sought to be discovered pursuant to criminal investigations. A proper, objective reading of the statute, however, must be considered the Legislature's statement of public policy. Because the Legislature protected peer review documents in broad terms, the public policy argument must be resolved in favor of confidentiality. *In re Investigation of Lieberman* at 387, 389. [Emphasis in Opinion.]

Peer review is "essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 42; 594 NW2d 455 (1999), quoting *In re Petition of Attorney Gen*, 422 Mich 157, 169; 369 NW2d 826 (1985), quoting *Bredice v Doctors Hosp, Inc*, 50 FRD 249, 250 (D DC 1970), *aff'd* without opinion 156 US App DC 199; 479 F2d 920 (1973). In order to promote "the willingness of hospital staff to provide their candid assessment" in peer review proceedings, the Legislature has enacted two primary measures to protect peer review activities from intrusive public involvement and from litigation. See *Dorris* at 42.

In *Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 685; 719 NW2d 1 (2006), this Court was asked to consider the scope of the peer review privilege under MCL 333.531. The *Feyz* Court held:

Peer review is a *communicative process*, designed to foster an environment where participating physicians can freely exchange and evaluate information without fear of liability if the hospital ultimately relies on peer review evaluations and adversely affects the reviewed physician's hospital privileges. *It is obvious that peer review immunity is designed to promote free communications about patient care practices, as both the furnishing of information to the peer review entity and the proper publication of peer review materials are acts which are granted immunity.* All the protected activities relate to the exchange and evaluation of such information. Moreover, the peer review statutory regime protects peer review from intrusive general public scrutiny. *All the peer review*

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*communications are protected from discovery and use in any form of legal proceeding.* [Emphasis added.]

Questions of statutory interpretation, such as the proper construction of the peer review immunity statute, are reviewed de novo. *Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 672; 719 NW2d 4 (2006), citing *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006).

The court's role is to give effect to the intent of the Legislature, as expressed by the language of the statute. *Feyz* at 672, citing *Grimes v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006). The courts apply clear and unambiguous statutes as written, under the assumption that the Legislature intended the meaning of the words it has used in the statute. *Feyz* at 672, citing *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). As the Court of Appeals and this Court have previously held, the obvious intent of the Legislature was to create a "comprehensive ban" on information gathered by or for a peer review entity.

In defining statutory language, a court must consider the "plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Feyz* at 672-73, citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). While words are construed according to their plain and ordinary meaning, those that have acquired a peculiar and appropriate meaning in the law are construed according to that peculiar and appropriate meaning. *Feyz* at 673, citing MCL 8.3a.

Courts cannot substitute their opinions for that of the legislative body on questions of policy. See *Feyz* at 679, citing *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999), quoting the dissenting opinion of YOUNG, P.J., in the Court of Appeals in that case quoting *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939). The Court of Appeals' decision in *Harrison v Munson Healthcare, Inc.* created an **arbitrary distinction** between "factual information

objectively reporting contemporaneous observations” and “records, data, and knowledge’ gathered to permit an effective review of professional practices.” *Harrison* at \*40.

The statutory language found under MCL 333.20175(8) and MCL 333.21515 makes no reference or distinction relative to facts “contemporaneously reported” for purposes of peer review. Rather, the statutory language simply states “records, data, and knowledge collected for or by individuals or committees . . . .” See MCL 333.21515 and MCL 333.20175(8). The statutes contain no language whatsoever regarding a time-based limitation on whether information collected by or for a peer review entity is privileged. By creating an arbitrary distinction relative to “contemporaneously reported” facts, the Court of Appeals improperly usurped the role of the Legislature.

To this end, the terms “data” and “knowledge” have not acquired any peculiar meaning in the law and must therefore be given their plain and ordinary meaning. See *Feyz* at 673, citing MCL 8.3a. The Merriam-Webster Dictionary defines “data” as “*facts or information* used usually to calculate, analyze, or plan something” or “*factual information.*” Meanwhile, the Merriam-Webster Dictionary defines “knowledge” as “*the fact or condition of knowing something with familiarity gained through experience or association*” or “*the fact or condition of having knowledge or of being learned.*”

The Court of Appeals failed to give the plain and ordinary meaning to the statutory terms used by the Legislature by creating the “contemporaneously reported” distinction. The Legislature’s intent was clear when it indicated “records, data, and knowledge collected for or by individuals or committees . . . .” See MCL 333.21515 and MCL 333.20175(8). The language must therefore be applied without judicial construction.

The terms “data” and/or “knowledge” are synonymous with the term “factual information” and “facts” and must be given their plain meaning. The peer review statutes extend the privilege to all facts collected for individuals or committees with a peer review function. This is also a logical interpretation that is consistent with the Legislature’s attempts to provide comprehensive protection to hospital’s peer review process. Such an interpretation is also consistent with promoting the willingness of hospital staff to provide candid information to a peer review committee for assessment in peer review proceedings. See *Dorris* at 42. To hold otherwise will have a substantial dampening effect on healthcare professionals’ willingness to provide candid information for fear that these “objective facts” can be later used against them in a legal setting.

Because the Court of Appeals’ recent decision in *Harrison* is having such broad implications and has substantially eroded hospital’s peer review privileges it is incumbent upon this Court to correct the error and reverse not only the trial court’s order requiring production of Defendant’s “Improvement Report” but the Court of Appeals’ holding in *Harrison*. More specifically, this Court must give due deference to the Legislature’s intent in creating the peer review privileges found under MCL 333.21515 and MCL 333.20175(8). Failure to do so results in violation of the principal of separation of powers –one that defines the powers of the judiciary branch and limits its ability to legislate.

**B. THIS MATTER IS FACTUALLY DISTINCT FROM HARRISON V MUNSON HEALTHCARE, INC AND PRODUCTION OF THE FIRST PAGE OF THE “IMPROVEMENT REPORT” IS NOT WARRANTED.**

Defendant respectfully maintains that the Court of Appeals’ *Harrison* opinion was in error and improperly usurped the role of the Legislature. However, even if this Court is convinced that *Harrison* applies here, production of Defendant’s “Improvement Report” is still unwarranted.

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In *Harrison* a subtle, yet significant, distinction was created relative to the review and/or deliberative process of a hospital's peer review committee and "factual information objectively reporting contemporaneous observations or findings." *Harrison* at \*40 and \*44. Indeed, the Court of Appeals indicated that while the peer review privilege applied to most of the incident report, it did not apply to the contemporaneous notes created while in the operating room. *Id.* at \*35-36.

In this case, a contemporaneous record describing the event at issue was separately created and made part of Ms. Krusac's medical records. As noted earlier, the procedure log described Ms. Krusac as rolling off of the cath lab procedure table. (See **Exhibit 11**). To this end, no valid argument can be made as to whether information contained in the "Improvement Report" could have just as easily been made part of Ms. Krusac's medical records. **The information was already made part of her medical records!** Any other information or entries were clearly made for purposes of the peer review process and are privileged.

Further, in *Harrison*, the Court of Appeals indicated that it "express[ed] no opinion regarding whether Munson should have produced the first page of the incident report to **Harrison during discovery.**" *Id.* at \*48. Rather, the focus was on whether the incident report contained "facts" which fundamentally conflicted with the defense presented. *Id.*

The trial court has already conducted an in-camera review of the "Improvement Report." In its May 8, 2014 Order, the trial court never determined that the facts contained within the Report were "in fundamental conflict" with the presented defense of this matter. The only logical interpretation is that the facts contained within the "Improvement Report" are **consistent** with the medical record entries that were made and subsequent witness testimony provided by Defendant's

staff members. Thus, Plaintiff has not demonstrated “exceptional necessity” as Plaintiff has other sources readily available for this information. See *Bruce*, supra, at 169.

In light of the factual distinctions between *Harrison* and those presented here, Defendant submits that production of the “Improvement Report” is not warranted or proper.

### CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellant Covenant Healthcare respectfully requests that this Court issue an Order holding this matter in abeyance pending the outcome of the Application for Leave to Appeal which was filed on or about March 13, 2014 stemming from the Court of Appeals’ *Harrison v Munson Healthcare, Inc.* holding. Any opinion issued by this Court on the *Harrison* Application will be directly controlling on the instant matter currently set for trial on May 13, 2014.

In the alternative, Defendant-Appellant requests that this matter be joined with the *Harrison* Application as the issues presented are identical and have significant impact on future litigant’s and statutory interpretation related to Michigan’s peer review statutes. See MCL 333.20175(8) and MCL 333.21515.

*Respectfully submitted,*

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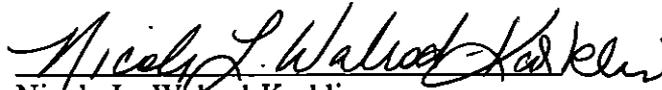
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Dated: May 12, 2014

**Proof of Service**

The undersigned certifies that a copy of the foregoing document was electronically served to all counsel of record on 5/13, 2014.

  
Nicole L. Warrod-Karklin

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